

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

MARVIN LEE BAZILE,

Defendant and Appellant.

D073920

(Super. Ct. No. SCN367105)

APPEAL from a judgment of the Superior Court of San Diego County, Harry M. Elias, Judge. Affirmed in part and reversed in part.

Theresa Osterman Stevenson under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney General, Robin Urbanski and Brendon W. Marshall, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Marvin Lee Bazile of six counts: (1) kidnap to commit rape, sexual penetration, oral copulation, and robbery (count 1; Pen. Code,<sup>1</sup> § 209, subd. (b)(1)); (2) forcible rape (count 2; § 261, subd. (a)(2)); (3) sexual penetration by use of force (count 3; § 289, subd. (a)); (4) forcible oral copulation (count 4; § 288a, subd. (c)(2)(A)); (5) robbery (count 5; § 211); and (6) attempting to dissuade a witness from reporting a crime by implied force or threat (count 6; § 136.1, subd. (b)(1)). The jury also made true findings on counts 2 through 4 that Bazile kidnapped the victim, and on counts 2 through 5 that he personally inflicted great bodily injury on her. It also found threat of force in connection with count 6. Bazile admitted a serious felony and strike prior conviction, within the meaning of sections 667, subdivision (a)(1), 668, and 1192.7, subdivision (c), as well as sections 667, subdivisions (b) through (i), 1170.12, and 668, for which he was convicted in September 1993. The court sentenced Bazile to an indeterminate sentence of 164 years to life and a determinate sentence of 31 years.

Bazile appeals, contending there was insufficient evidence to support the convictions on counts 5 and 6 and insufficient evidence to support a true finding of personal infliction of great bodily injury. He also contends the court improperly imposed a prison sentence for the kidnapping conviction, which had the same intent and objective as other counts for which he was sentenced, and it abused its discretion by denying Bazile's request to strike a prior strike. He seeks remand, so the trial court may exercise its newly-acquired discretion under sections 667 subdivision (a) and 1385, and he asks us

---

<sup>1</sup> All section references are to the Penal Code.

to correct the court's erroneous order of 504 days of presentence custody credit instead of 505 days.

We agree that the matter must be remanded so the trial court may consider its discretion in applying the enhancements under amended sections 667, subdivision (a) and 1385 and that the number of presentence credits must be corrected. However, we find no merit in Bazile's remaining arguments.

### FACTUAL AND PROCEDURAL BACKGROUND

Karina and four family members went to a restaurant together the night of November 11, 2016. There, the five women shared a large platter of food and three towers of beer. Karina estimated she drank between six and eight glasses of beer at the restaurant and was drunk. When the restaurant closed around midnight, a man the group met at the restaurant drove them in one of the women's truck to a club, dropping off one of the women at home on their way.

At the club, the women danced, and Karina may have had another beer. When the club closed shortly before 2:00 a.m., Karina walked to the truck and got into the backseat. The woman driving did not want to drive Karina home and told Karina to look for the others from their group for a ride. Karina exited the truck and began looking for the others, but she could not find them.

In the parking lot, Karina came across Bazile, who was standing next to a dark SUV. She explained she was lost, looking for her cousins, and Bazile offered to help her. Karina climbed into the front passenger seat. Bazile began driving fast in the parking lot, then turned onto the street, where he drove even faster. Karina was scared, so she tried to

get out of the car, but the door was locked. Karina told Bazile she wanted to get out of the car, and Bazile pushed her hand away and aggressively said, "Shut up, bitch." Karina begged Bazile to take her home to her children.

Instead, Bazile drove to a dark place with which Karina was unfamiliar. Once there, Bazile grabbed Karina's purse and threw it out of the vehicle. He started hitting Karina repeatedly in the face with his fist, and Karina attempted to block the blows with her hands.

Next, Bazile pushed Karina between the two front seats to the back seats, which had been flattened. Bazile began pulling off Karina's clothes and hitting her in the face as she cried. Bazile told Karina he was hitting her because she would not listen to him. Bazile performed oral sex on Karina and touched her vaginal area with his hands. He penetrated her vagina and touched the area outside her anus with his fingers. As he was performing oral sex, Bazile offered Karina a piece of paper containing white powder and asked if she wanted any cocaine; Karina said no. He grabbed some and placed it in Karina's mouth, which she tried to keep closed; Karina spit it out. He also tried to place some in her vagina.

Bazile also placed his lips on Karina's lips to kiss her, and she kissed him back. Then Bazile turned over Karina so that she was face down on her knees, and he placed his penis in her vagina. Bazile took out some lotion and rubbed it on her body, like he was cleaning her with it; then she got dressed.

Karina estimated she was with Bazile in his car for about three hours. At one point, Karina asked Bazile if he was going to kill her, and Bazile mentioned having a gun with him but said he was not going to kill her.

When they were leaving, Karina told Bazile she needed her purse back; he found it outside the vehicle and gave it back to her. When he returned the purse to her, he looked at her driver's license and told Karina he knew who she was and where to find her. He said she should not call the police. Then he returned her identification card, her keys, and some money in the purse. Bazile told Karina that he was sorry for what he had done and began driving them.

Karina told Bazile she was thirsty and asked him to leave her at a nearby 7-Eleven. Bazile told Karina he knew she would call the police, but she denied she would; she was afraid of him and feared he would kill her. Bazile dropped off Karina on the road, and she ran from the SUV to the 7-Eleven, where she asked the cashier for help and borrowed the phone to call 9-1-1. Karina told the 9-1-1 operator that her assailant had mentioned having a gun and took some of her money. She later reported some of the money and her debit card were missing. Karina was also missing her cell phone, which was recovered from her cousin's truck several days later.<sup>2</sup>

Paramedics arrived and transported Karina to Palomar Medical Center, where she was seen in the Emergency Room. Karina's left eye was swollen shut for two weeks. The nurse who conducted the Sexual Assault Response Team (SART) exam later that

---

<sup>2</sup> Karina initially told police Bazile stole the phone.

morning characterized the swelling of her left eye as extensive and expressed concern about pupil reaction and eye damage. Her right eye had broken blood vessels, and Karina suffered bruising on her temple, toward her ear, and down her cheek along the side of her mouth. She had long scratches extending from her left shoulder across the center of her back and on her left leg, as well as swollen lips, with an abrasion. Karina also suffered bruising on her hands and forearms, along her ankle and on her knees and thighs, as well as scratches on her left leg, and cuts on the tops of her hands.

Karina's blood alcohol concentration was .0083 percent - .0085 percent when it was collected at 11:35 a.m. on November 12, 2016, it would have been .1083 percent - .2085 percent ten hours earlier. She also tested positive for cocaine in an amount less than 5 ng/ML; no scientific conclusion could be drawn as to the method of ingestion.

DNA material collected from Karina during her SART exam matched Bazile's DNA.

### *Defense Case*

Defense counsel moved to dismiss charges and allegations under section 667.61, subdivisions (a), (c), (d), as well as the kidnap allegation under subdivisions (b), (c), and (d), along with the allegations connected to sections 12022.7 and 12022.8 for personal infliction of great bodily injury. The court denied the requests, noting there was sufficient evidence to support both the enhancements, including testimony from the SART nurse and documentary/photographic evidence, and commenting that the fact finders would evaluate the credibility of witnesses.

Bazile testified at trial and told the jury he and Karina had engaged in consensual sex in the back of his SUV. He testified that he met Karina outside the club around 1:00 a.m. and they talked for about 25 minutes. He invited Karina to go to a hotel with him to share powder cocaine and a bottle of rum he had, and she agreed. Bazile testified that Karina climbed into the driver's seat of his vehicle, but she struggled because it was a stick shift, so he drove. He said she directed him to a place to stop. Then she pulled out a small, flat item and put the cocaine powder on it, dividing it up between them, and she used a straw she had to sniff her portion.

Bazile told the jury that he and Karina started kissing, and Karina removed her heels and climbed into the back seat. Then Bazile laid the seats flat, climbed back to join Karina, and began kissing her. Karina began removing her pants, and Bazile helped her; then he performed oral sex on her. They had intercourse for about six to eight minutes, with Bazile on top of Karina.

They got dressed, and Bazile noticed some money sitting next to Karina, which she then picked up and put into her bra. As Bazile drove, Karina directed him back to the club parking lot where they had met, and they exchanged phone numbers on paper. Karina got out of the vehicle, and Bazile went home.

Bazile denied forcing Karina to go anywhere against her will. He also denied punching her, raping her, forcing her to take any type of controlled substance, telling Karina he had a gun, or threatening to kill her.

### *Verdicts & Sentencing*

The jury found Bazile guilty on all six counts: (1) kidnap (§ 209, subd. (b)(1)); (2) forcible rape (§ 261, subd. (a)(2)); (3) sexual penetration with use of force (§ 289, subd. (a)); (4) forcible oral copulation (§ 288a, subd. (c)(2)(A)); (5) robbery in the second degree (§ 211); and (6) attempting to dissuade a witness from reporting a crime (§ 136.1, subd. (b)(1)). It also made true findings as to all the alleged enhancements, concluding that Bazile personally inflicted great bodily injury upon Karina (§§ 12022.7, subd. (a); 12022.8), substantially increased the risk of harm to Karina through kidnapping (§ 667.61, subs. (a), (b), (c), (d) &/or (e)), and used force or an express or implied threat of force in attempting to dissuade her from reporting a crime (§ 136.1, subd. (c)(1)).

Bazile admitted that in 1993 he was convicted for assault with a deadly weapon (§ 245, subd. (a)(1)), with an allegation of personal use of a deadly or dangerous weapon (§ 1192.7, subd. (c)(23)). Defense counsel asked the court to strike the prior conviction for purposes of sentencing, and the court denied the request.

The court sentenced Bazile consecutively to life with a minimum eligible parole date of 14 years on count 1, 50 years to life on count 2, staying the sentence for the true finding of infliction of great bodily harm, 50 years for count 3, staying the true finding of infliction of great bodily harm, and 50 years for count 4, staying the sentence for the true finding of the infliction of great bodily harm. The court also awarded determinate sentences: four years on count 5 for robbery, with the true finding of infliction of great bodily harm stayed, and two years on count 6 for attempting to dissuade a witness, with the true finding of threat of force stayed. The court also awarded five years for each of



counts 1 through 5 for a first serious felony prior, adding an additional 25 years. The total sentence was for 31 years, plus 164 years to life. The court awarded Bazile 504 days credits for time served.

## DISCUSSION

### A.

#### *Challenges to Convictions*

We review a conviction for substantial evidence. (*People v. Johnson* (1980) 26 Cal.3d 557, 576.) "The test on appeal is whether substantial evidence supports the conclusion of the trier of fact, not whether the evidence proves guilt beyond a reasonable doubt." (*Ibid.*) We "presume in support of the judgment the existence of every fact that the trier of fact could reasonably deduce from the evidence." (*People v. Medina* (2009) 46 Cal.4th 913, 919.) We do not reweigh evidence or reevaluate the credibility of witnesses. (See *People v. Cochran* (2002) 103 Cal.App.4th 8, 13, disapproved of on other grounds in *People v. Soto* (2011) 51 Cal.4th 229, 248.) If evidence permits a reasonable trier of fact to conclude the charged crime occurred, the ability to reconcile the facts with a contrary finding does not warrant reversal. (See *People v. Valdez* (2004) 32 Cal.4th 73, 104 (*Valdez*).) Testimony from a single witness is sufficient to support a conviction. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

#### 1. *Robbery*

Bazile contends there was insufficient evidence for a robbery conviction. Robbery requires the taking of personal property from another by means of force or fear with the intent to permanently deprive the owner of the property. (§ 211; see *People v. Avena*

(1996) 13 Cal.4th 394, 414 [intent to rob is to permanently deprive victim of property].)

To prove the use of fear, the evidence must demonstrate the victim "was in fact afraid, and that such fear allowed the crime to be accomplished." (*People v. Mungia* (1991) 234 Cal.App.3d 1703, 1709, fn. 2.) There is no requirement the victim resist; nor does the victim's fear need to be extreme. (*People v. Morehead* (2011) 191 Cal.App.4th 765, 775.) Evidence that there was "'conduct, words, or circumstances reasonably calculated to produce fear'" is sufficient. (*Ibid.*)

When Karina entered Bazile's car, she had \$80 in cash, her bank card, and her identification card. Before Bazile reached the lot where he stopped the vehicle, Bazile had already prevented Karina from exiting the vehicle by swatting away her hand as she tried the door handle and telling her to "shut up, bitch" when she said she wanted to leave. Thus, by the time Bazile threw Karina's purse out of the vehicle into the dark, Bazile's words and action had already made Karina afraid to respond. Any thought she had of searching for her purse was eliminated when he began hitting her repeatedly in the face. Thus, a reasonable juror could conclude Bazile deprived Karina of her purse and its contents by use of fear.

At the time Bazile threw the purse out of the vehicle, it was not clear he planned to later retrieve it. Bazile only retrieved the purse when he was ready to leave because Karina said she needed it. Even then, he returned her identification card and her keys, but only some of the \$80 she had in her purse when she entered his vehicle. A trier of fact could reasonably deduce from this evidence that Bazile intended to deprive Karina of the purse and its contents when he initially threw it into the dark, where it would be

difficult to find. Even though he eventually returned the purse and some of its contents, a trier of fact could reasonably conclude that he kept some of her money, thus permanently depriving her of that property, as intended. Accordingly, there is substantial evidence to support the robbery conviction.

2. *Attempting to Dissuade a Witness*

Bazile contends the evidence was insufficient to support a conviction for attempting to intimidate a witness from making a report she was a victim of a crime because a reasonable inference could be drawn from the evidence that Bazile's statements were not intended to intimidate Karina. Bazile notes that Karina was intoxicated during their encounter, implying she may have misunderstood his actions. He also argues that evidence shows he apologized to Karina, offered to take her home, and headed in the direction of her home after looking at her address on her identification; thus, a reasonable inference could be drawn that he was not attempting to intimidate her.

However, the test for substantial evidence is not whether a trier of fact could draw a reasonable inference from the evidence that supports the defendant's contention; rather, we consider whether the evidence permits a reasonable trier of fact to conclude the charged crime occurred. (See *Valdez, supra*, 32 Cal.4th at p. 104.) Thus, as long as a reasonable juror could conclude that Bazile's statements were an attempt to intimidate Karina from reporting the crimes against her, the conviction must stand.

Here, after looking at her address on her driver's license, Bazile told Karina he knew who she was and where to find her and that she had children, and he told her not to call the police. The implication was that harm would come to Karina or her family if she

reported the crime. This implication is further bolstered by Bazile's later statement that he thought Karina would call the police if he dropped her off near the 7-Eleven. His words and actions could reasonably be interpreted as an attempt to dissuade her from reporting his crimes, supporting his conviction for violating section 136.1, subdivision (b)(1).

### 3. *Great Bodily Injury*

Bazile contends the jury's true finding that Bazile had personally inflicted great bodily injury on Karina in connection with counts 1 through 5 is not supported by the evidence because Karina suffered a swollen, black eye and some scratches or bruising on her arms, legs, and hands, but experienced no bleeding around the eye, did not lose consciousness and did not suffer head, neck, or back pain. Bazile downplays Karina's injuries, implying that because Karina could see out of her eye after two weeks and because she did not require additional medical treatment, surgeries, or rehabilitation, her injuries were not sufficiently significant for the jury's true finding.

A person who inflicts great bodily injury on another in the commission of a felony is subject to a three-year enhancement. (§ 12022.7, subd. (a).) Great bodily injury is "a significant or substantial physical injury" (§§ 12022.7, subd. (f), 12022.8) and is "not insignificant, trivial or moderate." (*People v. Armstrong* (1992) 8 Cal.App.4th 1060, 1066 (*Armstrong*).) It is "commonly established by evidence of the severity of the victim's physical injury, the resulting pain, or the medical care required to treat or repair the injury." (*People v. Cross* (2008) 45 Cal.4th 58, 66.) A fine line separates an injury from being significant or substantial and from one that is not, and where to draw that line

is a factual determination. (*People v. Escobar* (1992) 3 Cal.4th 740, 750, 752; *Cross*, at p. 64.)

Here there was ample evidence for the jury to conclude Karina's injuries were not insignificant or trivial. (See *Armstrong, supra*, 3 Cal.App.4th at p. 1066.) Karina suffered pain in her face, broken blood vessels in her right eye, bruising on her temple, down her cheek, along the side of her mouth, and swollen lips with an abrasion. She had long scratches across the center of her back and on her left leg, as well as cuts on the tops of her hands. Karina also suffered bruising along her ankle, knees and thighs, and the nurse who conducted the SART exam characterized the swelling to her left eye as extensive. The swelling was so severe that Karina suffered pain and could not see for two weeks. A jury could reasonably conclude these physical injuries were severe. In light of this substantial evidence, we decline to disturb the jury's factual determination.

## B.

### *Kidnapping Sentence*

Section 654 prohibits punishment for two crimes arising from a single, indivisible course of conduct. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208 (*Latimer*)). This is "to ensure that a defendant's punishment will be commensurate with his culpability." (*People v. Correa* (2012) 54 Cal.4th 331, 341.) "If all the offenses are incidental to one objective, the defendant may be punished for any one of them, but not for more than one. [Citation]." (*People v. DeVaughn* (2014) 227 Cal.App.4th 1092, 1112 (*DeVaughn*), citing *People v. Centers* (1999) 73 Cal.App.4th 84, 98.) "Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of

section 654 depends on the intent and objective of the actor. If all the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.' " (*People v. Rodriguez* (2009) 47 Cal.4th 501, 507, italics omitted.)

In *Latimer*, the defendant kidnapped his victim, drove her to the desert, raped her, and left her there. (*Latimer, supra*, 5 Cal.4th at p. 1205.) The Supreme Court contemplated whether the defendant could be punished separately for the kidnap and rape convictions and concluded that although the kidnap and rape were separate acts, because there was no evidence the intent or objective behind the kidnapping was anything other than to facilitate the rape, section 654 barred executing a sentence on the kidnapping count. (*Latimer*, at pp. 1205, 1216-1217.)

Here, the jury specifically found that Bazile kidnapped Karina to commit rape, sexual penetration, oral copulation, or robbery. Because the jury found the intent and objective for kidnapping was sexual assault, the court could not properly sentence Bazile for both the kidnapping and the rape. (See *DeVaughn, supra*, 227 Cal.App.4th at p. 1112.) Accordingly, on remand, the court must stay the sentence for count 1, kidnapping, pursuant to section 654.

### C.

#### *Denial of Romero Motion*

Bazile was convicted of burglary in 1988, for which he was granted probation, during which time he incurred a number of probation violations. He was convicted of assault with a deadly weapon by means of force likely to produce great bodily injury in

1990, for which he received probation, which was revoked numerous times, and a three-year prison sentence. He also received a three-year prison sentence in 1991 for vehicle theft, and he received another three-year prison sentence in 1993 for assault with a deadly weapon, during which he personally used a deadly weapon. In 1997, Bazile violated parole and returned to prison until 1999 to complete the sentence.

At sentencing, Bazile's attorney asked the court to strike his 1993 conviction because it was not a sexual offense and was remote in time. The trial court considered the request; it noted the remoteness in time from the present offense and commented that if the 1993 conviction were the only one to consider, it might strike the offense. However, the court also noted convictions predating the 1993 offense, all of which involved violence and acts "similar to the conduct that was described during trial." The court considered whether Bazile fell outside the spirit and scheme of the purpose of the three strikes law and concluded that because the prior offense and the current offense were both violent crimes, imposing the strike did not.

Bazile contends the court abused its discretion by denying his request to strike the prior strike. Bazile argues the court's reliance on convictions involving acts of violence or being of a nature similar to the ones for which he was convicted here were not actually part of Bazile's conviction history, and Bazile made significant changes in his life, with no arrests or convictions after the one in 1993.

Trial courts have discretion to dismiss "strike" prior convictions in limited cases. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 530.) The dismissal must be "in furtherance of justice." (§ 1385; *People v. Thimmes* (2006) 138 Cal.App.4th 1207,

1213.) A trial court's failure to strike a prior conviction allegation is subject to review for abuse of discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 371, 374; *People v. Gillispie* (1997) 60 Cal.App.4th 429, 434-435 (*Gillispie*).) The court must consider both the defendant's constitutional rights and the interests of society. (*Romero*, at p. 530.) Moreover, "[w]here the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, [the reviewing court] shall affirm the trial court's ruling, even if [it] might have ruled differently in the first instance." (*People v. Myers* (1999) 69 Cal.App.4th 305, 310.) A court abuses its discretion when its decision exceeds the bounds of reason. (*People v. Williams* (1998) 17 Cal.4th 148, 162.)

Although the trial court is not required to offer its reasons for declining to exercise discretion under section 1385 (*Gillispie, supra*, 60 Cal.App.4th at p. 433), the reasons the court offered on the record here demonstrate the court's reasonableness in declining to strike the prior. (*Id.* at p. 434 [" '[A]ll that is required on the appellate record is a showing that the court was aware of its discretion to select an alternative disposition.' "].) The court appropriately considered whether striking the conviction would further the interests of justice. The court's review of Bazile's record appropriately considered only crimes for which he was convicted. Moreover, although the court recognized three prior convictions for crimes of a violent nature, the court's analysis focused on whether the new offense, like the strike offense, was a crime of violence: "I think . . . the issue of striking strikes . . . is whether the particular defendant is outside the spirit and scheme of what the original three strikes law was about, . . . which requires that the new offense also



be a crime of violence, as well as the strike offense, both of which are present here. [¶]  
Based upon that, the Court finds that I don't think the imposition of the strike, as alleged, is outside of the spirit and scheme of the three strikes law."

Notwithstanding Bazile's claim he had become an upstanding citizen since 1993, his behavior while out on probation or parole belies that claim because he was repeatedly returned to prison due to parole violations and was not ultimately released until 1999. The court's consideration of the violent nature of the strike prior conviction did not exceed the bounds of reason.

D.

*Section 667 Enhancements for Priors*

At the time of sentencing, the trial court lacked discretion to strike a prior serious felony conviction in connection with the five-year enhancement under section 667, subdivision (a)(1). (See *People v. Valencia* (1989) 207 Cal.App.3d 1042, 1045-1047.) Section 667 required imposition of the enhancement under subdivision (b) of section 1385, which did "not authorize a judge to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667." (Former § 1385, subd. (b).) However, Senate Bill No. 1393, which eliminated the mandatory imposition of five-year terms for serious prior felony convictions, became effective January 1, 2019, and it applies retroactively. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971-972.) Here, the court applied the enhancements, as required at the time. Accordingly, we remand the matter for resentencing. On remand, the trial court should contemplate its discretion to strike a prior serious felony conviction.

E.

*Correction of Presentence Custody Credits*

The parties agree there was a clerical error in the computation of presentence custody credits because Bazile served 505 days in custody but was credited with only 504. A clerical error can be corrected at any time. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.) On remand we direct the clerk to amend the minute order and the abstract of judgment to reflect 505 days of presentence custody credits.

## DISPOSITION

The sentence is vacated. The matter is remanded to the trial court with directions to conduct a resentencing hearing to stay the sentence on count 1 for kidnapping, pursuant to section 654, and to consider discretion in striking prior serious felony enhancements. We also direct the clerk to amend the minute order to reflect 505 days of presentence custody credits. The trial court shall prepare an amended abstract of judgment reflecting the sentencing decisions and correcting the number of days of presentence custody credits. In all other respects, the judgment is affirmed.

HUFFMAN, J.

WE CONCUR:

BENKE, Acting P. J.

GUERRERO, J.